



## IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.1353/06

In the matter between:

**MESHACK DUBE**

Plaintiff

**And**

**THE COMMISSIONER OF POLICE**

1<sup>st</sup> Defendant

**ATTORNEY GENERAL**

2<sup>nd</sup> Defendant

**Neutral citation:** *Meshack Dube vs The Commissioner of Police and Attorney*

*General (1353/2006) [2014] SZHC 139(04 July 2014)*

**Coram:** Hlophe J

**For the Plaintiff:** Mr. M. P. Simelane

**For the Defendants:** Mr. S. Khumalo

**Dates Heard:** 07 April 2014

**Judgment Handed Down:** 04 July 2014

## Summary

*Action proceedings – Plaintiff Claiming damages against the first Defendant for unlawful arrest and detention and subsequently for unlawfully having set the law in motion against him – Defendants raising a special plea in their plea, contending that the proceedings were instituted contrary to the provisions of Section 2 (1) (c) of The Limitation of Proceedings Against The Government Act of 1972 that is to say they were insituted after the lapse of twenty four months which the section prohibits – Defendants’ contentions disputed by Plaintiff who contends that from the facts of the matter and in accordance with Section 2 (1) (b) of the said Act, there was compliance with the Act in question – In effect Plaintiff contends that twenty four months should be reckoned from the end of 90 days contemplated by Section 2 (1) (b) of the Act – Meaning and effect of Section 2 (1) (b) on the requirements of section 2 (1) (c) of the Act – Whether a demand filed has the effect of extending the period contemplated in terms of Section 2 (1) (c) of the Act by the 90 days contemplated in Section 2 (1) (b) – Provisions of Section 2 (1) (c ) preemptory that no legal proceedings are to be instituted against the government in respect of any debt after the lapse of twenty four months reckoned from the day on which the debt became due – Proceedings instituted after twenty four months of incident giving rise to cause of action – Point raised per Special Plea upheld – Claim dismissed with costs.*

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## JUDGMENT

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- [1] On the 6<sup>th</sup> April 2006, the Plaintiff instituted action proceedings against the Defendants in terms of which he claimed damages arising from an alleged unlawful arrest and detention allegedly effected on him by officers of the first Defendant whilst acting within the course and scope of their duties. The summons was defended by the Defendants who filed a plea disputing liability to the Plaintiff.
- [2] The parties exchanged all the necessary pleadings and were, from an assessment of all the pleadings filed of record, left with only conducting a pretrial conference, before the matter would be ripe for hearing, when on or around the 4<sup>th</sup> March 2014, the Plaintiff filed a notice of Amendment in which he proposed to amend his particulars of claim. The thrust of this amendment was, to some extent, to change the cause of action relied upon, from being an unlawful arrest and detention of the Plaintiff to that of the first Defendant having wrongfully set the law in motion against him. The total amount of the damages claimed by the Plaintiff was not altered and remained fixed at E1, 215, 000.00.

[3] There having been no objection to the hitherto intended amendment there was filed the amended particulars of claim on the 24<sup>th</sup> March 2014. These were followed by an amended plea which was filed by the Defendants on the 2<sup>nd</sup> April 2014. Of significance in this amended plea was the special plea raised therein which was couched in the following terms:-

- “(a) The Plaintiff’s claim has prescribed in terms of the Limitation of Legal Proceedings Against The Government Act of 1972.*
- (b) [According to] Section 2 (1) (c); subject to Section 3, no legal proceedings shall be instituted against the Government in respect of any debt after the lapse of 24 months as from the day on which the debt became due.*
- (c) Plaintiff’s claim falls outside the 24 months period. Plaintiff’s arrest arose on the 12<sup>th</sup> September 2000 and summons were issued on 10<sup>th</sup> April 2006.*
- (d) Even if Plaintiff’s acquittal were to be considered (sic). Plaintiff was acquitted on the 17<sup>th</sup> June 2004 (sic). In as much as demand was issued on 3<sup>rd</sup> February, 2004, Plaintiff did not issue summons till the 10<sup>th</sup> April 2006.*

*Wherefore it may please the court to dismiss the Plaintiff’s claim with costs”.*

[4] When the matter was called before me on the day of its trial, it was agreed that the special plea raised and referred to above had to be determined first as a decision of it could have the effect of disposing off the matter in its entirety, particularly if it was upheld.

[5] During the hearing of the special plea the following were agreed to be the common cause facts:-

5.1 Whereas the Plaintiff was arrested on or about the 12<sup>th</sup> September 2000, his case was only finalized in December 2003 when he was acquitted. (There is however a view expressed elsewhere in the papers that the acquittal happened on 17<sup>th</sup> June 2004. It would seem however that on this latter day, there was only handed down the written judgment and reasons for the decision reached on the 3<sup>rd</sup> December 2003 when an ex-tempore order was pronounced for the discharge of the Plaintiff from prison).

5.2 On or around the 3<sup>rd</sup> February 2004, the Plaintiff served a demand on the Defendants.

5.3 On the 17<sup>th</sup> June 2004 there was handed down a written judgment and reasons for the Plaintiff's acquittal and discharge by the judge who had presided over the criminal trial.

5.4 Summons were issued on the 10<sup>th</sup> February 2006.

[6] The effect of the Special Plea raised was that the Plaintiff's claim was instituted out of time and had prescribed because it had been instituted after 24 months of the incident giving rise to the cause of action and was in that sense contrary to the provisions of Section 2 (1) (c ) of the Limitation of Proceedings Against the Government Act of 1972 which prohibited the institution of proceedings against the government and its departments after the lapse of twenty four months from the date of the incident giving rise to the cause of action. In this regard or sense the incident concerned was said to have occurred on 12 September 2000, when the Plaintiff was arrested and/or detained.

[7] It was contended further that even if the reckoning of the period for the prescription were to commence from the date of Plaintiff's acquittal, (which according to the Defendant's papers was the 17<sup>th</sup> June 2004 even though according to the Plaintiff and the subsequent agreement reached during the hearing of the matter, it was the 3<sup>rd</sup> December 2003), the proceedings were still filed out of time and contrary to the provisions of Section 2 (1) (c) of the Limitation of Proceedings Against The Government Act, 1972, when considering that the demand was filed on the 3<sup>rd</sup> February 2004.

[8] Considering the reasons spelt out in the paragraphs that follow, it is long settled that the date giving rise to the debt claimed or to the cause of action is the one on which the acquittal occurred in such matters. See *Comfort Shabalala vs The Swaziland Government Appeal Case No. 2618/95 at page 5*. Furthermore, it is obvious that the date of instituting the proceedings in court; that is the 10<sup>th</sup> April 2006, is not beyond 24 months if reckoned from the date cited by the Defendant, which is the 17<sup>th</sup> June 2004, as the one for the acquittal of the Plaintiff. There is no difficulty however in concluding from the common cause facts, agreed to be correct by both counsel during the hearing of the matter, that the acquittal of the Plaintiff was actually pronounced on the 3<sup>rd</sup> December 2003 and not on the 17<sup>th</sup> June 2004. This was not only agreed during the hearing, but could also be construed from the papers filed of record, particularly the judgment of Nkambule J, that the said latter date was only for handing down the written judgment and the reasons therefor.

[9] It was in recognition of this fact in my view that the demand by the Plaintiff was filed on the 3<sup>rd</sup> February 2004, which was within 90 days from, the 3<sup>rd</sup> of December 2003 when the delictual debt obviously became due. The Limitation of Proceedings Against The Government Act, per Section 2 (1) (a) provides that a demand can only be made within 90 days after the debt had become due which as noted above was after the 3<sup>rd</sup> December 2003.

The contention that the date of acquittal which also signifies the date on which the delictual debt became due, is the 17<sup>th</sup> June 2004, is obviously flawed because it would mean that the demand issued on the 3<sup>rd</sup> February 2004, was issued prematurely as it would have been issued before the debt became due. It would further mean that there is even a more fundamental problem for the Plaintiff as there would realistically speaking be no demand if the one relied upon was filed prior to the debt becoming due and would therefore not be in keeping with Section 2 (1) (a) of the Act as read together with the Proviso thereto.

[10] For the removal of doubt in the present matter, the delictual debt arose on the 3<sup>rd</sup> December 2003. If it is so, then the proceedings were instituted after the lapse of the twenty four months envisaged by section 2 (1) (c) of the Act when they were eventually instituted. The initial contention by the Defendants therefore that the debt arose on the 12<sup>th</sup> September 2000, falls to be rejected for the reasons set out above. Also to be rejected in this regard is the contention by the Plaintiff's counsel in his supplementary Heads of Argument filed after the matter had been argued, to the effect that the debt in this matter arose on the 17<sup>th</sup> June 2004 and that it was an error for them to have agreed that the debt arose on the 3<sup>rd</sup> December 2003. The fallacy in this contention, is that whilst it acknowledges that the Plaintiff was effectively acquitted and discharged



from custody on the said date, the delictual debt arose on a later date than that of acquittal which according to settled law and as shall be seen herein below, is the one on which the debt became due. Reference is made in this regard to ***Comfort Shabalala vs The Swaziland Government (Supra)*** at page 5. In this case, the position that the incident giving rise to the debt in such matters was the one on which the Plaintiff was acquitted rather than when he was arrested was put in the following words:-

*“Relying on these authorities Mr. Dunseith submitted that a complete cause of action only arose on the date when the Appellant had knowledge that the Chief Justice had set aside the order for eviction granted by the Magistrate in 1994. Before that occurred, had the Appellant issued summons based on unlawful eviction, he would have been met with the plea that eviction had been ordered by the Magistrate and that consequently the writ of eviction was a valid one. In my judgment that is a submission which is unanswerable. In attempting to answer it, Mr. Msibi, who appeared for the Respondent, submitted that the debt became due on the date of the occurrence of the delict and the correct step which Appellant ought to have taken was to file the demand as soon as the eviction took place; he should not have waited for the outcome of the review which was to test the legality thereof. Waiting for the result of the review proceedings, he submitted, was “risky” because the*

*prescription period was actually running irrespective of the steps being taken to address the problem.*

*The fallacy in that argument can be illustrated by reference to an action for damages based on alleged malicious prosecution. If Mr. Msibi's submission was valid then, by analogy, a Plaintiff wishing to sue for damages for malicious prosecution could validly institute action as soon as the prosecution commenced. The authorities are clear, however, that this is not so. It is a necessary ingredient of such an action that the Plaintiff be first acquitted by the court and until that occurs his cause of action is not complete – (underlining mine). See **Els vs The Minister of Law and Order 1993 (1) SA at P12**. See also **Mckenon's, The Law of Delict 7<sup>th</sup> Edition 264**".*

- [11] The cause of action having become complete upon the acquittal of the Plaintiff, which there is no dispute occurred on the 3<sup>rd</sup> December 2003, the 17<sup>th</sup> June 2004 was, as noted above, merely a date for the handing down of the court's written judgment and reasons for the decision it pronounced on the 3<sup>rd</sup> December 2003 when the Plaintiff was acquitted. The effect of this is that the demand issued on the 3<sup>rd</sup> February 2004 was a valid one as it was served within the 90 days of the incident giving rise to the cause of action. This was therefore in line with the provision of

Section 2 (1) (a) of The Limitation of Proceedings Against The Government Act of 1972. This section provides as follows:-

*“2. (1) Subject to Section 3 no legal proceedings shall be instituted against the Government in respect of any debt –*

*(a) Unless a written demand, claiming payment of the alleged debt and setting out the particulars of such debt and cause of action from which it arose, has been served on the Attorney General by delivery or by registered post.*

*Provided that in the case of a debt arising from a delict such demand shall be served within 90 days from the date on which the debt became due”.*

[12] Whilst somewhat admitting that the cause of action became complete on the 3<sup>rd</sup> December 2003, subsequent to which he filed or served a valid demand in compliance with Section 2 (1) (a) of the Limitation of Legal Proceedings Against The Government Act of 1972, the Plaintiff argued that according to Section 2 (1) (b) of the Act, he had to wait for 90 more days after having served the demand before he could file or institute legal proceedings if the Government had not indicated in writing prior thereto its written denial of liability. It was argued that in the current matter, the Government did not indicate its written denial of liability prior to the

lapse of the 90 days envisaged by Section 2 (1) (b) which provides as follows verbatim:-

*“ 2 (1) (b) Subject to section 3 no legal proceedings shall be instituted against the Government in respect of any debt –*

*(b) Before the expiry of ninety days from the day on which such demand was served on the Attorney General unless the Government has in writing denied liability for such debt before the expiry of such period;”.*

[13] According to the Plaintiff the 90 days from its demand filed on the 3<sup>rd</sup> February 2004, ended on the 3<sup>rd</sup> May 2004. It was entitled, it was argued, to institute its legal proceedings within 24 months of the day from which the ninety (90) days ended, which as stated above was the 3<sup>rd</sup> May 2004. Since the legal proceedings concerned were instituted on the 6<sup>th</sup> April 2006, that was before the lapse of 24 months as reckoned from the 3<sup>rd</sup> of May 2004 when the 90 days before which summons could be instituted after the serving of the demand, lapsed. In a nutshell the 24 months for filing or for instituting the legal proceedings should start reckoning from the end of the 90 days after the demand. To this extent it was contended that the legal proceedings were not instituted after the lapse of 24 months from the date on which the debt become due. A further meaning attached

to this argument is that the debt became due at the end of the 90 days reckoned from the filing of the demand.

[14] Section 2 (1) (c), which provides that proceedings should be instituted within 24 months of the day on which the debt became due, effectively says that period should be reckoned from that day. It in fact provides as follows verbatim:-

*“2 (1) Subject to Section 3, no legal proceedings shall be instituted against the Government in respect of any debt –*

*(c) After the lapse of a period of twenty-four months as from the day on which the debt became due”.*

It is important to note that in terms of this Subsection, the 90 days is reckoned from the day on which the debt became due and not the one on which the 90 days after filing or serving a demand lapsed.

[15] We have already determined that the debt in this matter became due on 3<sup>rd</sup> December 2003 when the Plaintiff was acquitted with the cause of action having become complete. The serving of a demand is therefore not synonymous with the extension of the date on which the debt became

due, which according to decided cases as shown above was when the Plaintiff was acquitted and eventually discharged from prison. The Act does not provide that the filing of the demand shall have the effect of extending the date of the completion of the cause of action by 90 days in cases where a demand had been made.

- [16] The position is in fact settled in our law that the institution of proceedings within twenty four months is peremptory and cannot be extended when considering the language of Section 2 (1) (c) of the Limitation Of Legal Proceedings Against The Government Act 1972. See in this regard the judgments of this court and the court of appeal which include; ***Walter Siphso Sibisi vs The Water and Sewerage Board and Another Civil Case No. 508/87; Comfort Shabalala v Swaziland Government Civil Appeal Case No. 2618/95.*** In ***Mandla Khumalo vs Attorney General and others Civil Trial No. 2987/1997***, Chief Justice S. W. Sapire, stated that there was nothing in the Act which gave the court the power to condone a failure to institute legal proceedings within 24 months from the day the debt became due. He expressed the position in the following words:-

*“It has to be noted that the granting of special leave is only applicable to a person debarred under Section 2 (1) (a) of the Act. Section 2 (1) (a) is the Section*

*which provides that a written demand has to be made and that in terms of Section 2 (1) (b) summons may not be issued before the expiry of 90 days from the date on which such demand is served on the Attorney General. Nothing is said in Section 4 or anywhere else, which would give the court the power to condone the failure to institute an action within 24 months as from the day on which the debt became due”.*

[17] The same position was emphasized by this court in ***Musa Sigudla and Another vs The Commissioner of Police and Others Civil Case No. 4043/2008*** where I had occasion to say the following which expressed a similar position as that stated in the judgment stated above:-

*“ Clearly, and assuming that the judgment was extending the period within which a demand could be filed within 90 days envisaged in Section 2 (1) (b) of the Act, Plaintiff was required to institute the proceedings for the claims made within 24 months of the date on which the debt became due”.*

[18] I have no doubt that when looking at the period between the 3<sup>rd</sup> May 2004, when the 90 days of the demand lapsed, and the 3<sup>rd</sup> of December 2005 when the 24 months lapsed and by which the legal proceedings were supposed to have been instituted, the period was long enough for the

Plaintiff to have instituted his action as envisaged in terms of the Act, and there can be no conceivable justification for failure to comply with the provisions of the Act. The delay in doing so by the Plaintiff is inexcusable and cannot be explained in any other way than that it depicted remissness on the Plaintiff's part, which unfortunately this court has no power to condone.

[19] For the foregoing considerations I have come to the conclusion that the Defendant's Special Plea succeeds with the effect that the Plaintiff's claim be and is hereby dismissed with costs.

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**N. J. HLOPHE**  
**JUDGE - HIGH COURT**